that the agreement of 30th August, 1958 ought to be specifically performed, leaving such further and consequential directions to follow as might be necessary.

For the reasons which I have stated I am of the opinion that this appeal should be dismissed with costs and I would order accordingly.

Appeal dismissed.

Solicitors: *Donaldson & Burkinshaw; Shearn Delamore & Co.*

MOHAMED HUSSAIN v. LEONG KEE HOOI & ORS.

[O.C.J. (Rigby J.) June 23, 1961]

[Penang — Civil Suit No. 184 of 1960]

Land Laws — Lease for two years with option to renew — Lessors terminating lease at end of original two years — Acceptance of rent after termination of original period — Subsequent sale by lessors "subject to a lease" — Declaration that plaintiff has exercised option and that lease is still in force — Injunction for interference with peaceful possession.

The plaintiff and his partner by an agreement dated June 27, 1958, agreed to take a lease from the 1st and 2nd defendants of a cinema and other associated equipment for 2 years from July 1, 1958, at a monthly rental of $325 with the option to renew. In December 1959 the plaintiff's partner retired and in May 1960 the plaintiff gave verbal notice to the defendants of his intention to exercise his option to renew the lease. The lease contained a clause providing that at the end of 2 years the lessees if they think fit could carry on for a further one or two years. The plaintiff further approached the 1st and 2nd defendants for the renewal of the said lease whereupon the defendants (the 1st and the 2nd) demanded that the rent be increased to $400 as a condition precedent to the renewal to which the plaintiffs did not agree. On the date of expiry of the said lease, i.e. June 30, 1960, the 1st and 2nd defendants informed the plaintiff by a notice sent through their solicitors that the lease had not been renewed. The 1st and 2nd defendants, however, accepted the rent for July 1960. The defendants subsequently completed the sale of the business to the 3rd and 4th defendants "subject to a lease". In this action the plaintiff claimed (1) a declaration that the lease of June 27, 1958 was valid and in full force till June 30, 1962; (2) an injunction restraining the defendants, their servants and agents from interfering with the plaintiff's peaceful possession of the said cinema; (3) an order for the return of certain specified parts of the cinematographic apparatus wrongfully removed by the 1st and 2nd defendants; (4) damages and other further relief.

It was argued for the defendants (a) the lease was void because no memorandum of lease had been executed and registered in accordance with section 92 of the Kedah Land Enactment; (b) the cinema stood on State land, the subject of a temporary occupation licence for one year subject to renewal and it was not transferable; (c) the option for renewal was void for uncertainty.

Held: (1) as the land was State land subject to a temporary occupation licence valid for one year and not transferable to grant a declaration as requested would be tantamount to validating a document which was expressly contrary to law;

(2) the plaintiff had a prior right to possession as against the 3rd and 4th defendants and as such he was entitled to the injunction asked for;

(3) the plaintiff was entitled to an order against all the defendants for the return of the cinematograph equipment wrongfully removed from the cinema;

(4) the plaintiff was entitled to damages from all four defendants as specified in the judgment.

ACTION.

Ong Huck Lim for the plaintiff.

Triptipal Singh for the 1st and 2nd defendants.

Lee Thean-Chu for the 3rd and 4th defendants.

Cur. Adv. Vult.

Rigby J.: In this action the plaintiff claims:—

(1) a declaration that the lease dated the 27th June, 1958, in respect of the Bee Lean Cinema Theatre at Bedong, and made between the first two defendants as the lessors, of the one part, and himself and his then partner, of the other part, is valid and of full force for a further period of two years from the 1st day of July, 1960, to the 30th day of June, 1962;

(2) an injunction to restrain the defendants, their servants or agents, from interfering with his peaceful possession of the cinema theatre;

(3) an order for the return of certain specified parts of cinematographic apparatus, more particularly described in the Writ of Summons and the Statement of Claim, wrongfully removed by the 1st defendant from the cinema theatre on the 1st September, 1960;

(4) damages and any further or other relief.

The facts giving rise to the claim are briefly as follows. By an agreement dated the 27th June, 1958, the plaintiff and his then partner agreed to take a lease from the 1st and 2nd defendants (to whom I will hereafter refer as "the defendants" in contradistinction to "the 3rd and 4th defendants") of "the Bee Lean Cinema, together with its building equipments and projectors, telephones and electricity and other apparatus as per list" for a period of two years from the 1st day of July, 1958, at a monthly rental of $325. The agreement contained a clause providing that "at the end of two years' agreement period if the lessees think fit that they could carry out a further one or two years more than the lessors have the right to keep back the deposit till the termination of the period".

It further contained the usual clause that in the event of any dispute arising between the parties the matter should be submitted to arbitration.

Due to curfew restrictions and other unforeseen circumstances in connection with the Emergency, business was bad with the result that in December, 1959, the plaintiff's partner retired from the business leaving the plaintiff to carry on on his own. With the subsequent relaxation of the Emergency restrictions culminating in the termination of the Emergency itself, business improved. In May, 1960, the plaintiff, according to his evidence, gave verbal notice to the defendants of his intention to exercise his option of renewing the lease. The defendants deny that any such notice was given to them. I have no hesitation in accepting the evidence of the plaintiff, in preference to that of the defendants, that he did, in fact, give such notice. I am fortified in that view by the fact that on the 15th May, the defendants' solicitors wrote to

the plaintiff informing him that certain specified items of stock required repair or replacing and stating that if they were not attended to before the end of May "my clients will refuse to renew the said lease".

By a somewhat belated letter dated the 16th June the plaintiff himself replied to the defendants' solicitors' letter and stated that some of the articles had been sent back for repairing and the defendants would be advised in due course.

On the 20th June the defendants, through their solicitors, replied to that letter stating that since the plaintiff could not comply with their requests stated in their letter of the 15th May, they did not intend to renew the lease and required the plaintiff to quit and deliver up possession of the cinema before the 1st July, 1960, when his lease would have expired.

Thereafter the plaintiff, according to his evidence, which I accept and believe, again approached the defendants for a renewal of the lease. According to his evidence, which I accept, the defendants demanded that the rent be increased from $325 to $400 as a condition precedent to renewing the lease. The plaintiff did not agree to any such increase.

On the 30th day of June, the day the original lease expired, the defendants instead of renewing the lease, caused a notice dated the 30th June, to be served by their new solicitors upon the plaintiff informing him that the lease had not been renewed and requiring him that very day to give up possession of the cinema, failing which they would take immediate proceedings against him as a trespasser. That same evening, according to the plaintiff, the parties met in a coffee shop at Bedong, in the presence of arbitrators or mediators, and after discussion it was agreed that the plaintiff should be permitted to carry on the business for a further period of two years, in accordance with the option contained in the lease. The defendants deny that there was any such agreement reached in the coffee shop. The evidence of the plaintiff in this matter is supported by the testimony of one, Shaikh Hussain, who described himself as one of the arbitrators called to mediate between the parties. On the evidence I am fully satisfied that an agreement was reached between the parties, with the aid and intervention of the arbitrators as mediators, whereby the plaintiff was to be permitted to remain in possession of the cinema for a further period of two years, in accordance with the option contained in the lease.

On the 26th July the defendants, through their solicitors, again wrote to the plaintiff, stating that the lease had already expired and requiring him to give up immediate possession of the cinema. Despite that fact, however, on the 6th August the rent for July was paid by the plaintiff and accepted by, or on behalf of, the defendants.

On the 4th day of August the defendants entered into a written agreement to sell the cinema as a going concern to the 3rd and 4th defendants. The purchase price was to be $11,500; a deposit of $4,000 was made at the time of the signing of the agreement, and the balance was to be paid by the 25th August, failing which the deposit would be forfeited and the agreement to become null and void.

On the 14th day of August the defendants wrote to the plaintiff informing him:—

(1) that the cinema would be sold on the 31st day of August, 1960, to the 3rd and 4th defendants;

(2) that his lease would terminate by the 31st August, 1960; and

(3) that if he wished to lease the cinema from the new owners he should get in touch with them.

On the 18th day of August the plaintiff, through his solicitors, replied to that letter stating that he could neither agree nor admit that the lease would expire on the 31st August; that in fact it would continue for a further two years until the 30th day of June, 1962; and that he would hold the defendants and the intended purchasers responsible for carrying out the covenants contained in the lease.

On the 25th day of August the sale of the business to the 3rd and 4th defendants was completed and the balance of the purchase price paid. The recital clause of that indenture states that the purchase of the business was "subject to a lease". Those words, however, were not contained in the original agreement of sale nor, indeed, were they contained in the copy of the indenture of sale supplied to the 3rd and 4th defendants at the time of the completion of the transaction. Mr. S. C. Wong, the solicitor who prepared the agreement of sale, said that he added the words "subject to a lease" to the agreement after it had been drafted, but before execution, upon the instructions of the defendants but with the consent of the 3rd and 4th defendants. The 3rd and 4th defendants said that they were at no time told anything about an existing lease. They did know that someone — the plaintiff — was still running the cinema, but they understood that it was on a day to day basis and they were told by the 1st defendant that possession of the theatre would be given to them on the 31st day of August, 1960, at midnight. The 3rd and 4th defendants have not pleaded fraud and, in the absence of any specific allegation of that nature in the pleadings, whatever my own view of the matter upon the facts established before me may be, I must, for that reason, necessarily assume that they signed the indenture with the knowledge that the sale of the business was "subject to a lease". I am quite satisfied, however, that it was made clear to the 3rd and 4th defendants by the defendants that they would be given possession at midnight on the 31st day of August, 1960.

On the 29th day of August the plaintiff, through his solicitors, forwarded a cheque for the August rent to the defendants' solicitors.

That cheque was returned by the defendants' solicitors on the 7th day of September, together with a covering note stating that the August rent had already been deducted from the $975 deposit of 3 months' rent in advance paid to the defendants at the time of the execution of the lease. The letter further stated that the cinema had been sold to the 3rd and 4th defendants and the plaintiff should in future pay the rent to the new owners.

On the 31st day of August, at midnight, all 4 defendants, together with a number of other persons, proceeded to the cinema and saw the plaintiff. There was a film in progress at the time and the plaintiff informed the 1st defendant to return the following day between 2 to 4 p.m. The 4 defendants did, in fact, return the next day and, with the consent of the plaintiff, started to check the furniture and inventory. In the projector room, according to the evidence of the plaintiff, the 1st defendant, despite the protests of the plaintiff, removed specified parts of the projector. There is some conflict of evidence as to who actually removed these parts. I am satisfied that they were removed by, or upon the instructions of, the 1st defendant and handed over to the 3rd and 4th defendants by whom they have been retained since that date. The explanation given by the 3rd and 4th defendants is that they had gone to the cinema that day for the express purpose of the cinema being handed over to them in good running order in accordance with the terms of the agreement. For this purpose they checked the inventory of the stock, including the projection equipment, and since they were of the opinion that part of the projection equipment required testing and, if necessary, replacing, they obtained the permission of the defendants to take away these specific items. Whether that be the true explanation or whether the more likely and probable explanation is that the 4 defendants anticipated difficulty in obtaining possession of the cinema from the plaintiff and deliberately removed these essential working parts of the projector with the full knowledge that that would thereby prevent films from being operated and shown is, to my mind, immaterial. The essential fact is that I am, as I have said, satisfied and I so find, that the parts were removed, despite the protests of the plaintiff, by, or with the authority of, the defendants and handed over to the 3rd and 4th defendants in the possession of whom they have remained since that date.

On the 5th day of September the plaintiff, through his solicitors, served a notice of action on the 1st defendant, and on the 21st day of September they instituted proceedings against the defendants. On the 20th day of October the plaintiff took out a summons for leave to amend the writ of summons by adding the 3rd and 4th defendants as defendants to this action, and on the 24th day of October an order was made to that effect, and on the 24th day of November copies of the writ, as amended, were served upon the 3rd and 4th defendants. These are the facts of the case as I find them to be.

A number of legal objections were raised by both Mr. Triptipal Singh, who appeared for the defendants, and Mr. Lee Thean Chu, who appeared for the 3rd and 4th defendants. First, it was contended that the document of lease dated the 27th June, 1958, on which the plaintiff relies, is a lease of the land on which the cinema stands for a period exceeding one year and, as such, it is void by reason of the fact that no memorandum of lease has been executed and registered in accordance with the provisions of section 92 of the Kedah Land Enactment. The effect of non-registration is provided for by section 78 of the Enactment.

Secondly, it is said that the land itself upon which the cinema stands is State land, the subject of a temporary occupation licence for a valid period of one year, subject to renewal, and that it is not transferable. It is contended that the purported transfer of the land by way of a lease is, therefore, unlawful and void.

Thirdly, it was contended that even assuming the original lease itself was valid, the option for renewal — the form of which has already been stated earlier in this judgment — was void for uncertainty.

Dealing with the last point first, I am satisfied that the argument as to uncertainty must fail. It is quite clear that the intention of the parties was that at the end of two years the lessees would have an option to renew the lease, either for one year certain or for two years certain. There can, in my view, be no possible valid objection for the granting of an option to renew a lease in the terms as stated.

There is, in my view, very much more substance in the first two objections raised. The land in question upon which the cinema is built is State land issued under a temporary occupation licence dated the 5th January, 1956, for a period of one year and expressly stated to be not transferable. It is issued subject to the conditions of the Land Enactment Rules, rule 11(3) of which provides that licences are not transferable. The land officer, who was called by the court, at the request of both parties, for the purpose of producing the temporary occupation licence and the relevant file, and to assist the court generally, stated that the licence expired at the end of 1956, and that it has never been renewed. He also stated — and it is clear beyond doubt that it must be so — that if the licensee purported to transfer or grant a lease of the land it would be unlawful since he had no title to pass.

Since the land itself was not transferable it becomes unnecessary to consider the provisions of section 92 of the Kedah Land Enactment which provides that any person lawfully holding State land which he intends to lease for a period

of more than one year must execute a memorandum of lease in the requisite form and present it, together with his document of title to the land, for registration. Section 92 can clearly have no application in the case of a temporary occupation licence of State land, valid for one year and not transferable. Mr. Ong Huck Lim, for the plaintiff, asks for a declaration that the lease in question is valid and of full force for a further period of two years from the 1st day of July, 1960. To grant such a declaration would be tantamount to validating a document, the nature and effect of which is expressly contrary to the law, and it is manifest that this Court can make no such order. This part of the plaintiff's claim must accordingly fail.

The plaintiff then asks for an injunction to restrain all four defendants from interfering with his peaceful possession of the cinema. In my view he is entitled to such an order as against all the defendants. On the facts I am satisfied that he has been in actual possession of the cinema from July, 1958, to June, 1960, by virtue of an agreement between himself and the first two defendants, and that agreement was renewed by them for a further two years. The 3rd and 4th defendants may well have a claim for damages as against the defendants, but in so far as the plaintiff is concerned I am satisfied that he has a prior right to possession as against the 3rd and 4th defendants and, certainly, as against the defendants themselves. There must accordingly be an order for an injunction in the terms as prayed.

I am satisfied that the plaintiff is entitled to an order against all four defendants for the return of the cinema equipment specified in the writ and statement of claim and wrongfully removed from the cinema on the 1st day of September, 1960. But the 3rd and 4th defendants, by paragraph 2 of their statement of defence, state that they received these parts from the defendants on the 1st of September. By paragraph 4 of their joint affidavit dated the 18th day of January, 1961, they affirm that they have delivered them to two of the other persons who were partners with them in the purchase of the cinema business from the defendants on the 25th day of August, 1960, and that these partners have refused to return these parts. I accept this as correct. There must be an order for the return of these parts or their value by way of replacement. In the event of further argument as to the value of the missing parts, the matter must be referred to the registrar for assessment.

Dealing now with the last item of the plaintiff's claim, the claim for damages. The plaintiff contended that for 8 months of the year before the parts of the projector were wrongfully taken away on the 1st September, 1960, he was making a profit of about $500 per month, and he has put in evidence his accounts to substantiate that claim. These accounts have not been seriously challenged or proved incorrect, and I accordingly accept them. On the 27th day of January, 1961, the plaintiff was able to hire the parts wrongfully taken from the projector at a cost of $450 a month and thereafter to continue operating the cinema. There is evidence that during the month of October, 1960, the plaintiff was unable to obtain a licence from the police to operate the cinema, but on the evidence before me, including the unchallenged and uncontradicted affidavit, dated the 12th day of October, sworn by one Mohamed Haniffa, the supervisor employed by the plaintiff to run the cinema, together with a copy of a letter attached to that affidavit, I am fully satisfied that the failure to obtain the licence was directly due to a request to the police from the defendants, as owners of the cinema, not to issue the plaintiff with such a licence. I accordingly order that all four defendants do pay to the plaintiff damages at the rate of $500 per month as from the 1st day of September, 1960, up to the 27th day of January, 1961, and thereafter at the rate of $450 per month up to the date of the return to the plaintiff of the missing parts or their replacement value. Of these damages the 1st and 2nd defendants must pay such damages as from the 1st day of September, 1960, up to the 24th day of November, 1960, being the day the writ of summons, as amended, was served upon the 3rd and 4th defendants. As from the 24th day of November, 1960, up to the date of the return of the missing parts or their replacement value damages must be paid by all four defendants, jointly and severally. In arriving at my conclusions in this case I have not overlooked the respective arguments put forward by the 1st and 2nd defendants on the one part, and the 3rd and 4th defendants, on the other part. In particular, it is, of course, the case for the 3rd and 4th defendants that they had purchased the business of the cinema from the defendants, that they proceeded to the cinema on the 1st September to take delivery, and that the spare parts were handed to them by the defendants for repair and replacement, if necessary, at the expense of the defendants. I have considerable sympathy for the 3rd and 4th defendants in this case. But the fact remains that I am satisfied that the missing parts were wrongfully taken away from the plaintiff, despite his protests, and, on the admission of the 3rd and 4th defendants themselves, they have been in their possession since that date and they have refused to hand them over, despite the service upon them of the writ of summons in this action. That being so, they must accept the consequences of their wrongful retention of the plaintiff's property.

All four defendants must pay three-quarters of the plaintiff's taxed costs of this action; of such costs one-half must be paid by the 1st and 2nd defendants, and one-quarter by the 3rd and 4th defendants.

Order accordingly.

Solicitors: *Ong Huck Lim & Co.; Triptipal Singh; Lee Thean-Chu.*